BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

ESTELLE L. SHELTON Claimant VS. **VALLEY VIEW CARE CENTER** Respondent AND **CORNHUSKER CASUALTY CO.** Insurance Carrier	)	Docket No. 1,038,730
ESTELLE L. SHELTON Claimant VS. **VALLEY VIEW SENIOR LIFE** Respondent AND **UNITED WISCONSIN INS. CO.** Insurance Carrier	)	Docket No. 1,047,032

ORDER

STATEMENT OF THE CASE

Claimant requested review of the January 28, 2010, Preliminary Hearing Order entered by Administrative Law Judge Rebecca Sanders in Docket No. 1,047,032. Matthew R. Bergmann, of Topeka, Kansas, appeared for claimant. Michelle Daum Haskins, of Kansas City, Missouri, appeared for respondent, Valley View Senior Life, and its insurance carrier United Wisconsin Insurance Company (United Wisconsin). Ronald J. Laskowski, Topeka, Kansas, attorney for respondent, Valley View Care Center, and its insurance carrier Cornhusker Casualty Company (Cornhusker), does not appear.

In Docket No. 1,047,032, the Administrative Law Judge (ALJ) found that there was no evidence to substantiate that claimant suffered a new injury or exacerbation of a prior injury on July 2, 2009. Because the ALJ found that claimant had not suffered an injury on July 2, 2009, that arose out of and in the course of her employment, claimant's request for medical treatment was denied.

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the January 27, 2010, Preliminary Hearing and the exhibits, the transcript of the November 24, 2008, Preliminary Hearing and the exhibits, together with the pleadings contained in the administrative file.

ISSUES

Claimant contends the evidence shows she suffered personal injury by accident on July 2, 2009, that arose out of and in the course of her employment with respondent and asks the Board to reverse the ALJ's order finding she is not entitled to medical treatment for that injury.

Respondent Valley View Senior Life and United Wisconsin argue that claimant failed to show that she suffered personal injury arising out of and in the course of her employment on July 2, 2009, and that the ALJ's Preliminary Hearing Order should be affirmed.

The issue for the Board's review is: Did claimant suffer personal injury by accident on July 2, 2009, that arose out of and in the course of her employment with respondent?

FINDINGS OF FACT

Claimant has two workers compensation claims with respondent which have been consolidated. There has been no appeal with respect to the accident in Docket No. 1,038,730. This appeal only concerns the accident alleged in Docket No. 1,047,032.

In Docket No. 1,038,730, claimant is alleging she suffered an accident at work on December 23, 2007, and an aggravation of those injuries on January 3, 2008. As a result, she claims she has suffered severe headaches, right shoulder pain, and pain from the top of her neck to her low back with numbness and tingling in her legs.[1] Dr. Shari Quick was eventually authorized to provide treatment to claimant for her injuries from these accidents, and she first saw claimant on August 14, 2008. Claimant was given work restrictions limiting her lifting to no more than 20 pounds, no restrictions on lifting less than 10 pounds, no pushing or pulling greater than 30 pounds, and no repetitive bending, squatting or kneeling.

[1] Form K-WC E-1, Amended Application for Hearing filed February 25, 2008.

On February 13, 2009, Dr. Quick examined claimant at the request of respondent in order to provide an impairment rating. Claimant told Dr. Quick that she continued to have pain in her low back and legs. She complained of numbness in her entire right leg. Dr. Quick noted that claimant was self-limited by pain during the range of motion testing. Claimant also displayed several positive Waddell's signs for symptom magnification during the examination. Dr. Quick rated claimant as having a 5 percent permanent partial impairment to her whole body for her injuries. Dr. Quick recommended claimant continue with the work restrictions she had been given and "that she continue receiving her current medications for pain management from her primary care physician."[2] Claimant thereafter sought medical treatment on her own for back pain at a hospital emergency room on June 15, 2009, approximately two weeks before the accident alleged in Docket No. 1,047,032.

Claimant testified that on July 2, 2009, she was working at respondent, Valley View Senior Life, with restrictions. On that day, she was asked by a coworker to work the remote to the mechanical lift as the coworker was getting a resident out of bed. As the resident was being raised in the air, he began to slip through the middle of the sling. Claimant ran to help the coworker keep the resident from falling. She placed her knee underneath the resident and held the back of the sling. At the same time, she called for help, and another coworker came within seconds and took over from claimant. This second coworker helped get the resident into his wheelchair.

At the time claimant was assisting with the resident, she felt pain in her low back, neck and shoulder. The back pain went down her right leg. Claimant testified that the accident on July 2, 2009, caused a significant increase in her pain above what she felt prior to that accident. Claimant reported the accident to her supervisor that same day.

At the time of claimant's July 2009 accident, respondent had scheduled her for an independent medical examination by Dr. David Ebelke in regard to her earlier injury in Docket No. 1,038,730. Dr. Ebelke saw claimant on July 13, 2009. Claimant testified that Dr. Ebelke told her that he was not evaluating her in regard to her second injury of July 2009. Dr. Ebelke's report states that he is not evaluating her neck pain, upper extremity symptoms or headaches. Dr. Ebelke's report also states that claimant seemed angry that she had received no treatment for her neck. Further, Dr. Ebelke noted that although claimant rated her pain at between 7 and 10, she looked comfortable during the interview and examination.

After the interview, examination, and review of claimant's past medical records, Dr. Ebelke opined:

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[2] P.H. Trans. (Jan. 27, 2010), Cl. Ex. 3 at 2.

> [T]he work injury(ies) have all been nothing more than minor lumbar strains. [Claimant] has non-radicular lower extremity complaints; that is, she does not have "radiculopathy." Her back pain is benign. While the pain may be partly coming from L4-5 disc degeneration, her morbid obesity is probably contributing to her symptoms.[3]

Dr. Ebelke did not recommend further testing or treatment until such time as claimant develops more clear signs or symptoms of radiculopathy. He noted that claimant had similar episodes of back pain in the past and will have them in the future. He encouraged her to continue working and told her she may be as active as tolerated. He thought she might benefit from a psychiatrist, psychologist or substance abuse specialist regarding her continued use of narcotic medication, which he did not believe she should be taking, and he recommended she lose weight to lower the load on her spine. He explained to claimant that "she would have to live with her symptoms, as there is no drug, surgical or nonsurgical treatment that can resolve these complaints."[4]

On August 25, 2009, claimant, at the request of her attorney, was seen by Dr. Pedro Murati for an independent medical examination in regard to her accident of July 2, 2009, and the injuries she received therefrom. After examining claimant, Dr. Murati diagnosed her with low back pain with signs and symptoms of radiculopathy secondary to second injury, right SI joint dysfunction, myofascial pain syndrome affecting the bilateral shoulder girdles extending into the cervical paraspinals, and thoracic pain, all of which he related to claimant's July 2, 2009, accident at respondent.

Laura Mock testified that she is the Director of Nursing at respondent. She was aware of the July 2, 2009, incident, stating that claimant "put herself in the position to need to assist [a] resident beyond her abilities."[5] Ms. Mock testified that she knew claimant had restrictions and had discussed those restrictions with claimant. Ms. Mock also testified that since the July 2009 incident, she has observed claimant to be acting as if she was in pain. However, she said that one time she saw claimant running across the lobby with another employee. Another time, Ms. Mock saw claimant leaning over a wall that was a little more than waist high "in a fairly quick, aggressive type manner" in order to give another employee a high-five.[6]

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[3] P.H. Trans. (Jan. 27, 2010), Resp. Ex. 2 at 3.

[4] *Id.* at 4.

[5] P.H. Trans. (Jan. 27, 2010) at 29.

[6] P.H. Trans. (Jan. 27, 2010) at 30.

PRINCIPLES OF LAW AND ANALYSIS

K.S.A. 2009 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends."

K.S.A. 2009 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

An employer is liable to pay compensation to an employee where the employee incurs personal injury by accident arising out of and in the course of employment.[7] Whether an accident arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case.[8]

The two phrases arising "out of" and "in the course of" employment, as used in the Kansas Workers Compensation Act, have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable.

> The phrase "out of" employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Thus, an injury arises "out of" employment if it arises out of the nature, conditions, obligations, and incidents of the employment. The phrase "in the course of" employment relates to the time, place, and circumstances under which the accident occurred and means the injury happened while the worker was at work in the employer's service.[9]

An accidental injury is compensable under the Workers Compensation Act even where the accident only serves to aggravate a preexisting condition.[10] The test is not whether the accident causes the condition, but whether the accident aggravates or

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[7] K.S.A. 2009 Supp. 44-501(a).

[8] *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 278, 899 P.2d 1058 (1995).

[9] *Id.* at 278.

[10] *Odell v. Unified School District*, 206 Kan. 752, 758, 481 P.2d 974 (1971).

accelerates the condition.[11] An injury is not compensable, however, where the worsening or new injury would have occurred even absent the accidental injury or where the injury is shown to have been produced by an independent intervening cause.[12]

K.S.A. 2009 Supp. 44-508(d) states in part:

> "Accident" means an undesigned, sudden and unexpected event or events, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. The elements of an accident, as stated herein, are not to be construed in a strict and literal sense, but in a manner designed to effectuate the purpose of the workers compensation act that the employer bear the expense of accidental injury to a worker caused by the employment.

Claimant was involved in an incident at work on July 2, 2009, that fits the definition of an accident. That accident occurred while claimant was working and resulted from the performance of her job duties. Accordingly, claimant's accident arose out of and in the course of her employment with respondent. The real dispute and conflicting testimony lies with whether claimant was injured as a result of that accident.

The Workers Compensation Act defines personal injury and injury as:

> . . . any lesion or change in the physical structure of the body, causing damage or harm thereto, so that it gives way under the stress of the worker's usual labor. It is not essential that such lesion or change be of such character as to present external or visible signs of its existence. An injury shall not be deemed to have been directly caused by the employment where it is shown that the employee suffers disability as a result of the natural aging process or by the normal activities of day-to-day living.[13]

The greater weight of the credible evidence presented to date is that claimant's July 2, 2009, accident may have temporarily increased claimant's symptoms but did not cause her further injury or a new injury within the meaning of the Act.

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[14] Moreover, this review of a

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[11] *Woodward v. Beech Aircraft Corp.*, 24 Kan. App. 2d 510, Syl. ¶ 2, 949 P.2d 1149 (1997).

[12] *Nance v. Harvey County*, 263 Kan. 542, 547-50, 952 P.2d 411 (1997).

[13] K.S.A. 2009 Supp. 44-508(e).

[14] K.S.A. 44-534a; see *Quandt v. IBP*, 38 Kan. App. 2d 874, 173 P.3d 1149, *rev. denied* 286 Kan. __, (2008); *Butera v. Fluor Daniel Constr. Corp.*, 28 Kan. App. 2d 542, 18 P.3d 278, *rev. denied* 271 Kan. 1035 (2001).

preliminary hearing order has been determined by only one Board Member, as permitted by K.S.A. 2009 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board as it is when the appeal is from a final order.[15]

CONCLUSION

Claimant had an accident on July 2, 2009, that arose out of and in the course of her employment with respondent. That accident, however, did not cause her to suffer personal injury.

ORDER

WHEREFORE, it is the finding, decision and order of this Board Member that the Preliminary Hearing Order of Administrative Law Judge Rebecca Sanders dated January 28, 2010, is modified to find claimant had an accident on July 2, 2009, that arose out of and in the course of her employment, but the ALJ's finding that claimant sustained no new or additional injury from that accident is affirmed.

IT IS SO ORDERED.

Dated this _____ day of June, 2010.

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HONORABLE DUNCAN A. WHITTIER
BOARD MEMBER

c: Matthew R. Bergmann, Attorney for Claimant
Michelle Daum Haskins, Attorney for Respondent Valley View Senior Life and its Insurance Carrier United Wisconsin
Ronald J. Laskowski, Attorney for Respondent Valley View Care Center and its Insurance Carrier Cornhusker
Rebecca Sanders, Administrative Law Judge

[15] K.S.A. 2009 Supp. 44-555c(k).